

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RICHARD MOORE)	
Claimant)	
VS.)	
)	Docket No. 1,043,535
JACAM CHEMICALS, LLC)	
Respondent)	
AND)	
)	
ACCIDENT FUND INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appealed the November 19, 2009 Award entered by Administrative Law Judge Bruce E. Moore. The Workers Compensation Board heard oral argument on February 19, 2010, in Wichita, Kansas.

APPEARANCES

Mitchell W. Rice of Hutchinson, Kansas, appeared for claimant. Robert Wonnell of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a November 20, 2008 accident and resulting right thumb injury. In the November 19, 2009 Award, ALJ Moore stated:

The court will disregard Dr. Fluter's measurement of reduced range of motion and sensory loss that could not be anatomically related to Claimant's injury. Giving equal weight to the opinions of Drs. Chan and Fluter as to Claimant's loss of range of motion of the MP and IP joints, **Claimant has suffered a 7.5% impairment of function to the right thumb.**¹

The ALJ then granted claimant permanent partial disability benefits for a 7.5 percent functional impairment to the right thumb.

Claimant requests the Board modify the November 19, 2009 Award. As stated in his brief:

Claimant sustained his burden of proof regarding a 49 percent impairment to the thumb. At the very least, the Board should find neither medical opinion provided in this case to be more persuasive than the other and give equal weight to the ratings. The Award should be adjusted accordingly.²

Conversely, respondent requests the Board to affirm the Award.

The nature and extent of claimant's impairment is the only issue before the Board on this appeal.

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

The Board finds that the ALJ's Award accurately sets forth the factual circumstances surrounding the nature and extent of claimant's injury. Therefore, the Board adopts the ALJ's findings of fact as its own and will only reference those facts necessary to explain the decision.

Briefly, the matter involves the claimant, who worked as a welder for the respondent. On November 20, 2008, while cutting a piece of pipe, the claimant accidentally cut his right thumb. Claimant was taken to a clinic and then referred to Dr. Prince Chan, an orthopedic surgeon, for surgical repair of a laceration to a tendon in his right hand. Claimant was eventually released from Dr. Chan's care. Dr. Chan rated claimant with a 5 percent

¹ ALJ Award (Nov. 19, 2009) at 5.

² Claimant's Brief at 5 (filed Jan. 19, 2010).

impairment to the right thumb. At claimant's attorney's request, Dr. George G. Fluter evaluated claimant and provided an impairment rating of 49 percent to the right thumb. The ALJ found a portion of Dr. Fluter's opinions not related to the injury and modified Dr. Fluter's rating to a 10 percent impairment. Averaging the two ratings, the ALJ found the claimant suffered a 7.5 percent impairment to the right thumb.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the various conditions on which that right depends.³ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁴

The ALJ stated:

The sole remaining issue is the nature and extent of impairment suffered as a result of Claimant's injury. The authorized treating physician, an upper extremity specialist, rated Claimant at a 5% impairment. Dr. Fluter, a physiatrist, apparently rated sensory loss and loss of range of motion that could not be attributed to the injury Claimant suffered. Claimant did not suffer an injury to a nerve that affected motor function of the thumb, and did not suffer an injury affecting sensation on the palmar side of the thumb. Assuming Dr. Fluter's range of motion testing as to the MP and IP joints is accurate, and disregarding loss of function that could not be attributable to Claimant's injury, Dr. Fluter's rating would be 10% (5% each for reduced range of motion of the IP and MP joints).

The court will disregard Dr. Fluter's measurement of reduced range of motion and sensory loss that could not be anatomically related to Claimant's injury. Giving equal weight to the opinions of Drs. Chan and Fluter as to Claimant's loss of range of motion of the MP and IP joints, **Claimant has suffered a 7.5% impairment of function to the right thumb.**⁵

Claimant contends the ALJ had no rational basis for disregarding Dr. Fluter's measurements of reduced range of motion and sensory loss that could not be anatomically related to claimant's injury. Consequently, claimant requests the Board find he sustained

³ K.S.A. 2008 Supp. 44-501(a).

⁴ K.S.A. 2008 Supp. 44-508(g).

⁵ ALJ Award (Nov. 19, 2009) at 4, 5.

his burden of proof regarding a 49 percent impairment to the thumb or, in the alternative, the two medical opinions be accorded equal weight, the two ratings be split and the Award be modified accordingly.

The respondent asks the Board to affirm the ALJ's Award.

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.⁶ The Board agrees with the ALJ's finding that Dr. Chan's opinion is more persuasive than Dr. Fluter's in this instance. Namely, Dr. Fluter evaluated claimant at the request of claimant's attorney, which can create a bias towards the claimant. Most importantly, Dr. Fluter's ratings were partially based on portions of the *AMA Guides*⁷ unrelated to claimant's injury. The Board affirms the ALJ's Award in its entirety.

CONCLUSION

Claimant suffered a 7.5 percent impairment of function to the right thumb.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁸ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the November 19, 2009 Award entered by ALJ Moore.

IT IS SO ORDERED.

⁶ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

⁷ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

⁸ K.S.A. 2009 Supp. 44-555c(k).

Dated this ____ day of March, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mitchell W. Rice, Attorney for Claimant
Robert Wonnell, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge